UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR BOARD
WASHINGTON, D.C.

M.D. MILLER TRUCKING & TOPSOIL, INC.

and Case 13-CA-104166

GENERAL TEAMSTERS LOCAL UNION NO. 179,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

RESPONDENT M.D. MILLER TRUCKING & TOPSOIL, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE

A. Introduction and Issues

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent M.D. Miller Trucking & Topsoil, Inc. (hereinafter "MD Miller" or the "Company") hereby submits its brief in support of its Exceptions to the Decision of Administrative Law Judge Ira Sandron ("ALJ") dated April 9, 2014.[1]

On May 1, 2013, Charging Party, General Teamsters Local Union No. 179, affiliated with the International Brotherhood of Teamsters (the "Union") filed an unfair labor practice charge (the "Charge"), alleging that the Company violated Section 8(a)(1) and (3) of the Act by refusing to reinstate Edward McCallum ("McCallum") after a Grievance Board ordered him to be reinstated upon sustaining a grievance filed over McCallum's discharge. The Charge alleges that the Company has refused to reinstate McCallum by "imposing more onerous terms and conditions of employment, including requiring that he furnish documentation prior to his return that had never before been required." The Union amended the Charge on July 18, 2013 to include allegations that he Company engaged in direct dealing with employees seeking reduced wages and other benefits, and that the Company coerced employees by telling McCallum "he would not receive overtime if he refused to take a pay cut and that filing a grievance would be futile." The Board issued its Complaint on December 9, 2013.

In the Complaint and at the hearing held on February 19th and 20th 2014, counsel for the General Counsel specifically contended that the Company violated sections 8(a)(1) and (3) of the National Labor Relations Act (the "Act") by refusing to accept his medical certification and

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[1] References herein to the Administrative Law Judge's Decision shall be as follows: (ALJ Decision, p. ___.) References to the transcript of proceedings from the hearing in this matter shall be as follows: (Tr. __). References to the exhibits presented and admitted during the hearing shall be as follows: General Counsel Exhibit (GC __); Respondent Exhibit (R __); and Union Exhibit (Un __).

requiring him to "complete multiple medical certifications as a condition of returning to employment" in retaliation for McCallum's alleged protected concerted activities. The Complaint also alleged unlawful direct dealing, threats to withhold overtime from employees that insisted on being paid the wages and benefits contained in the applicable collective bargaining agreement and stating that the filing of a grievance would be futile. The ALJ found merit to the Complaint allegations.

The questions raised by the Company's exceptions to the ALJ's Decision are: (1) whether the ALJ's finding that the Company failed to comply with General Counsel and Union subpoenas was erroneous; (2) whether the ALJ erroneously excluded relevant documents and testimony based on his ruling with respect to subpoena non-compliance; (3) whether the ALJ erroneously failed to consider the applicable federal regulations governing the medical certification procedures involved in this case; (4) whether the ALJ failed to consider the record evidence showing that McCallum suffered no adverse action in this matter, but rather was simply required to follow applicable federal regulations, doctor evaluation and recommendations, and established company practices; (5) whether the ALJ erroneously found that the Company's adherence to federal regulations, doctor evaluations and recommendations and company practice established anti-union animus or pretext for refusing to reinstate him; (6) whether the ALJ erred in finding that McCallum's union activity was a motivating factor in the Company's requirement that he obtain a valid "long form" medical evaluation or undergo a Skills Performance Evaluation ("SPE") as recommended by the treating and evaluating doctors, respectively; (7) whether the ALJ erred in finding that the Company's requirement that McCallum obtain a valid "long form" medical evaluation, and an SPE as recommended by the treating and evaluating doctors, respectively, demonstrated anti-union animus or pretext for refusing to reinstate him; (8)

whether, even assuming the General Counsel made a prima facie showing of discriminatory conduct, the ALJ erred in finding that the Company would not have required McCallum to provide a valid long form and obtain a second medical opinion without such discriminatory motive; (9) whether the ALJ erred in concluding that the Company's statements conveyed that unionization or union activity was futile; and (10) whether the ALJ's credibility findings are supported by the record evidence. For the reasons stated herein, and consistent with Board precedent, Respondent respectfully submits that the ALJ erred with respect to each of the above questions and requests that the Board reverse the ALJ's rulings, findings and conclusions, strike the recommended Order, and dismiss the Complaint.

B. Statement of Relevant Facts

1. The Company's Business and Operations

MD Miller is a trucking company, which hauls aggregate, asphalt and other road building materials. (Tr. 302). The Respondent's work season was dictated by weather, as it did not operate during the winter months or when it was raining. (Tr. 303). Marlene Miller ("Marlene") is the owner of MD Miller. (Tr. 240). Chad Miller ("Chad") is Marlene's son and, along with truck driving responsibilities, serves as a supervisor and dispatcher for the MD Miller. (Tr. 301). In 2013, Respondent had approximately 12 employees, including Marlene, Chad and Chad's wife, Cathy, who worked in the office. (Tr. 241).

MD Miller operates out of a facility in Rockdale, Illinois, where it keeps its trucks in its "yard." MD Miller mainly operates semi dump trucks, but its drivers also operate flatbed trucks at various times. (Tr. 305).

2. The Company Is Subject to the Federal Motor Carrier Safety Administration and Its Regulations

Respondent is a corporation engaged in the trucking business which services clients

"directly engaged in interstate commerce." (*See* GC 1(e), Complaint, § II(b)). Based upon its business and the size of the tractor/trailers that it transports, Respondent is subject to the requirements of the U.S. Department of Transportation's ("DOT") Federal Motor Carrier Safety Administration ("FMCSA") and, in particular, the regulations the FMCSA is empowered to carry out ("FMCSRs", found at 49 C.F.R. Part B §390.00, *et seq.*[2] Respondent is an "employer" as defined under FMCSR §390.5. McCallum is a driver and employee under the FMSCR. *Id.*

FMCSR § 391.41(a)(1)(i) states that a "person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so." Section 391.41(b) further states (emphasis added):

> (b) A person is physically qualified to drive a commercial motor vehicle if that person -
>
> (1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a skill performance evaluation certificate pursuant to § 391.49;
>
> (2) **Has no impairment of:**
>
> (i) A hand or finger which interferes with prehension or power grasping; or
>
> **(ii) An arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or has been granted a skill performance evaluation certificate pursuant to § 391.49.**
>
> (3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;
>
> (4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure.
>
> (5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his ability to control and drive a commercial motor vehicle safely;

[2] The ALJ refused to consider the application of FMCSRs as argued by the Company in its post-hearing brief. (ALJ Dec. p. 1, last sentence). For the reasons set forth at length, *infra*, the ALJ erred in not considering the FMSCRs, especially considering that those regulations, and their application to this case, were heavily discussed and put at issue at the hearing by all involved parties.

(6) Has no current clinical diagnosis of high blood pressure likely to interfere with his ability to operate a commercial motor vehicle safely;

(7) **Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his ability to control and operate a commercial motor vehicle safely;**

(8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;

FMCSR § 391.41(b). As referenced in Section 391.41(b)(2)(ii), drivers with an impaired arm, let or foot that interferes with their ability to operate a commercial motor vehicle, may still be qualified after undergoing a skills performance evaluation ("SPE") pursuant to Section 391.49 (Alternative physical qualification standards for the loss or impairment of limbs). When conflicts between medical evaluations conducted by an employer's medical professional and the driver's medical professional arise, the FMCSA regulations provide that either party (or the parties jointly) may request the dispute to be resolved by the FMCSA through procedures under Section 391.47 (Resolution of conflicts of medical evaluation). Moreover, employers are required to maintain specific documents related to drivers, including medical certification, under Section 391.51. Once a driver obtains medical certification from a doctor under the FMCSR, the doctor completes a report (referred to herein and at the hearing as a "long form") and the driver is issued a certificate (referred to herein and during the hearing as a "medical card"). FMCSR § 341.43(f)-(h).

3. Edward McCallum's Employment

McCallum was hired by MD Miller in 2002 as a truck driver. (Tr. 25). Since approximately that same time, McCallum has been a member of the Union. (Tr. 28). McCallum would work for the Company each "season" from approximately March or April in the spring until November or December, at which time he would be laid off for the winter season, along

with the other drivers, because the Company's business did not operate during the winter months. (Tr. 25).

As a driver subject to the FMCSA regulations, McCallum was required to keep current his medical certification stating that he was qualified to drive a commercial motor vehicle. FMCSR § 391.41. During the 2010 season, McCallum was diagnosed with multiple sclerosis ("MS"). (Tr. 38). Despite his new diagnosis, McCallum was medically certified by a DOT-authorized doctor for the maximum 24-month period. (GC 18). McCallum discussed his MS and his treatments with Marlene Miller periodically, and she also discussed with him her own medical issues. After he was diagnosed with MS, McCallum also informed Chad that McCallum did not want to drive flatbed trailers when those trailers were loaded with potentially unstable materials, as he was concerned his MS would cause him to fall if he needed to climb onto it in order to load, unload or secure it. McCallum made three or for such requests in 2012. (Tr. 40-42, 304-05). Chad accommodated these requests, as well as requests for time off McCallum needed in order to receive certain treatments for his MS, one day every four weeks. (Tr. 40-42).

During the 2012 season, both Marlene and Chad Miller noticed that McCallum's ability to perform his job functions was steadily getting worse.[3] (Tr. 310-11; 352, 355). Chad described that, as the season went on, McCallum had more and more trouble just getting in and out of the

[3] McCallum claims that his MS-related symptoms remained the exact same from the time of his diagnosis in 2010 until the present. However, his testimony is belied by several facts, many of which are uncontested. First, in 2010, despite being already diagnosed with MS, McCallum was approved for a 24-month FMCSA medical certification and no issues were noted by his doctor on his "long form" medical form. (GC 18). In March 2013, he was approved for only 6 months in order to monitor his MS. (GC 6, p. 3 of 3). The March 2013 long form also noted that McCallum suffered "minimal left foot drop after exertion"). (*Id*.) In May 2013, he again was approved for only a 6-month period, the doctor noting he had a "(+) limp, foot drop (L)". (GC 12). By November 2013, McCallum was only approved for a three-month period due to his MS. Moreover, as of April 2, 2013, McCallum had been fitted with a device called a "WalkAide." That device sends an electric shock to his left foot in order to pick it up when walking. Clearly, despite his self-serving testimony, his condition was deteriorating, as described by the Millers.

cab of his truck. (Tr. 310-11). Marlene noticed that when she saw McCallum in the yard in 2012 "[h]is face was very flushed. He was pulling his left leg. He had trouble moving. He was slow, very slow. He--He had physical difficulties." (Tr. 352). At the end of the 2012 season, McCallum asked to be the first truck driver laid off for the winter, as the cold weather affected his MS symptoms (Tr. 143).

In the spring of 2013, when the season was starting up, McCallum asked to be the last driver called back from lay off, again citing his MS symptoms. (Tr. 311). McCallum was called back to work on April 4, 2013. (Tr. 148). Interestingly, McCallum had just days before been fitted with the WalkAide device, which "sends an electric shock to [his] foot to pick it up while [he] walk[s]. (Tr. 144-45, 148). However, McCallum did not wear the device to work and McCallum was not observed by Miller while wearing the WalkAide. (Tr. 145, 148) Upon returning to work for the 2013 season, McCallum turned in his medical card to Chad Miller, by leaving it either in a bin with other paperwork or on the passenger seat of Chad's truck.

Just in the first few days after his return to work Chad and Marlene noticed that McCallum's condition had worsened. [4] Chad testified that in observing McCallum on jobsites and in the yard during his first week back to work in 2013 that McCallum "had a hard time getting out of the truck. I mean, he was – it was slow. You know, he was moving really slow getting in and out." (Tr. 313). Marlene stated that when she saw McCallum in the yard at the Rockdale facility, she approached McCallum because "he looked very flushed and not — not well. That's why I took it upon myself to go up and say hello to him, to see if he was okay, how was he doing." (Tr. 355).

[4] Again, McCallum testified that his MS symptoms had been unchanged since he was diagnosed in 2010. Please see the preceding footnote as to why the record evidence belies such self-serving testimony.

4. The April 11, 2013 Meeting and McCallum's Discharge

Marlene called a meeting of all employees at the Company's Rockdale shop on April 11, 2013 to discuss the Company's poor financial position and to discuss ways in which costs could be saved. This meeting took place just one week after McCallum had returned to work from the winter layoff. At this meeting, Marlene raised the issue that a pay reduction could be necessary, but urged the drivers to think of other ways to reduce operating costs. Specifically, another driver, Frederick Crownhart ("Crownhart"), described the nature of the meeting: "…we started talking about, you know, saving fuel, not popping tires and then, you know, the idea of maybe a pay cut. But it wasn't like you have to do this. It was just, you know --just spitballing, you know, throwing ideas out there." (Tr. 290).

McCallum interrupted Marlene and insisted that he would not take any cuts in his wages or his insurance coverage. Marlene specifically told him that she could not speak to the employees about reductions to their benefits, including insurance, but that the employees should think of alternative ways to help cut costs. Despite that McCallum testified that he remained calm and only spoke in a normal conversational tone and volume, the ALJ found that McCallum was being less than credible in those assertions. While the ALJ did not find that McCallum had acted or spoke in the way that the Company's witnesses stated (yelling and cursing and stating that he did not care if the Company went out of business), the ALJ did find that McCallum raised his voice, engaged in a "heated exchange" and "got pretty upset." (ALJ Dec. p. 2, ll.37-39; p. 8, l. 42 to p. 9. l. 2). Crownhart testified that McCallum interrupted the meeting and was "loud and disruptive" in doing so. (Tr. 289-90, 292).

Upon McCallum's loud and disruptive interruption, Chad Miller interjected himself, and told McCallum not to speak to his mother in the tone and language McCallum was using. Chad admits to using profane language and becoming upset with McCallum after listening to

McCallum's outburst, which McCallum himself admits had lasted several minutes. It is during this exchange that McCallum alleges Chad threatened him with a loss of overtime. After McCallum and Chad went back and forth arguing, Marlene, who had heard enough of McCallum's load, disruptive and profanity laced outburst discharged McCallum for his insubordination. McCallum stated then that he would file a grievance and Marlene stated he could do what he wanted, but that grievance would go nowhere.

5. McCallum's Grievance and Grievance Hearing

McCallum went to the Union's offices upon being discharged. There he met with Union Business Agent, Gregory Elsbree ("Elsbree"). Elsbree contacted Chad Miller to attempt to resolve the matter, but Chad declined to reinstate McCallum. Elsbree then prepared a grievance over the discharge as well as two other grievances (for failure pay proper wages and for making deals outside of the contract). (GC 3, 4 & 5).

The three grievances were heard by the contractual Grievance Committee on April 22, 2013. At the grievance hearing, McCallum answered questions from the Grievance Committee regarding his termination and the subject matter of the other grievances. Marlene Miller represented the Company in defending the grievances. At the hearing on the grievances, Marlene learned for the first time that McCallum needed to wear the "WalkAide" device in order to help him walk.[5] At the conclusion of the hearing, one of the members of the Grievance Committee apologetically informed Marlene that the committee was finding in McCallum's favor on two of the three grievances, including the discharge grievance, because the Company's

[5] McCallum testified that that subject of his medical condition did not come up in any way at the grievance hearing. However, he was contradicted in that testimony by Union Business Agent Elsbree, who testified that the subject of McCallum's medical condition was discussed at the hearing. It is clear from the record evidence is that it was during this meeting that Marlene Miller first learned of McCallum's use of the WalkAide device. McCallum testified that he only started wearing in on April 2, 2013, but that he had never worn it to work or in front of Chad.

work rules were not made part of the record (which, if submitted, presumably may have justified the discharge for failure to adhere thereto). Before leaving the building where the hearing was held, Marlene found McCallum, gave him a Company Nextel two-way mobile device that the Company supplies its drivers (Tr. 366-67). McCallum understood that she gave it to him because he would need it for work now that he was being reinstated.

Marlene, however, was concerned that McCallum's MS, which already had appeared to her to be worsening, may be more than a mere perception, now that she had learned McCallum needed a device in order to walk, which he had not been wearing at work and which he had not disclosed to the Company. Accordingly, upon returning to the Company offices, Marlene had her daughter-in-law (who performs administrative functions for the Company) pull McCallum's file to determine if his medical certifications were in order. The medical card was located, but it was discovered that the Company did not have a current long form on file for McCallum. Marlene left McCallum a voicemail requesting the long form.

In the meantime, Chad Miller, after being informed that McCallum was to be reinstated, texted McCallum with his job assignment for the next day. After Marlene informed Chad that she had left McCallum a message regarding needing a copy of his most-recent long form certification before he could be allowed to work, Chad texted McCallum to ascertain whether he had received Marlene's voicemail.

6. McCallum's Medical Certification and Issues Related Thereto

McCallum initially responded to Chad stating that he could not locate his long form and would need to obtain a copy from his doctor the next day. The next day, however, McCallum found his long form, issued in March 2013, and delivered it to the Company. Because the following day was a rain day, McCallum was not scheduled to work. However, upon reviewing the March 2013 long form, Marlene Miller noticed that McCallum had not properly indicated his

conditions in the portion to be filled out and certified by the driver. Specifically, he had checked "no" to all the boxes asking whether he had any of the listed conditions, two of which were "muscular disease" and "missing or impaired hand, arm, foot, leg, finger, toe." (GC 7). Moreover, it must be noted that not only did McCallum not truthfully check the boxes listing certain medical conditions, but he also failed entirely to disclose the medications he currently was taking. *Id*. Accordingly, because of McCallum's misrepresentations on the long form (which on its face states that a failure to give all requested information may render the certification invalid, *see id*.), her observations of his worsening condition and his inability to do certain job functions, and her concern for his safety and the safety of her equipment and other motorists, Marlene Miller concluded that a new evaluation likely was necessary. However, she contacted the FMCSA and inquired as to how she should handle the situation, especially in light of the issues she noted in the incomplete long form. Cris Cavanaugh from the FMSCA informed her that it would be advisable in the situation to have McCallum sent for a new medical examination performed by an FMCSA-approved physician.

Marlene followed that advice and looked up the list of FMCSA-approved doctors on the FMSCA website. She chose Dr. H. Moiduddin as his office was the closer of the two listed doctors to McCallum's house.[6] Although Miller had never before sent a driver for a second

[6] Counsel for the General Counsel stated at the hearing that the General Counsel was not challenging Dr. Moiduddin's partiality. However, in the General Counsel's Brief, he insists that Miller's sending McCallum was part of some nefarious plan—because, apparently, Miller allegedly knew (and hoped) it was not likely that McCallum could pass a medical examination by Dr. Moiduddin. (GC Brf. P. 14-16, stating that Miller was "soon rewarded" by Dr. Moiduddin's request for information from McCallum's neurologist, "much to the Millers' satisfaction"). However, because the General Counsel is NOT contesting the impartiality of Dr. Moiduddin—or the genuineness of his examination, the General Counsel admits that, on the record evidence of McCallum's condition, as even the General Counsel considers it, the Millers had a genuine doubt that McCallum's condition as of April of 2013 would allow him to meet the threshold level to pass an impartial DOT medical examination.

opinion on a medical certification, she had never before been faced with the set of facts before her.

MD Miller scheduled McCallum to be examined by Dr. Moiduddin on April 24, 2013, two days after the grievance hearing and one day after Miller examined the incomplete long form. McCallum went to the examination as scheduled. McCallum described the examination as the most "invasive" one he had ever endured for a medical certification, even though it lasted only 10 minutes. Dr. Moiduddin asked him several questions about his MS, which McCallum also found to be invasive. His prior DOT physicals, by comparison, lasted only up to about 7 minutes and, and apparently, did not focus much on the effects of his MS (which would be consistent with his failure to give the prior examining doctors much information about his condition or his medications). At the conclusion of the "invasive," 10-minute examination, Dr. Moiduddin gave McCallum a letter for McCallum's neurologist treating his MS. The letter sought certain information regarding McCallum's diagnosis, prognosis, medications, adherence to treatment, and asking whether in the neurologist's opinion McCallum was safe to drive a truck. (GC 8) McCallum's neurologist, Roumen Balabanov responded to the letter with incomplete information (GC 9) and Dr. Moiduddin's office requested more information. The second letter from Dr. Balabanov stated only that "I cannot clear whether Mr. McCallum can drive or not. Patient needs to be tested for drive." (GC 10). Dr. Moiduddin's office again requested clarification from Dr. Balabanov, who sent a third letter on May 7, 2013 that stated, in part that Dr. Balabanov did not have "the ability to comment on Mr. McCallum's ability to safely drive a truck," and clarified that McCallum "may undergo testing to further evaluate abilities to drive safely." (GC 11). Based on Dr. Balabonov's letters and his medical evaluation of

McCallum, Dr. Moiduddin concluded he could not medically certify McCallum to drive a commercial vehicle. Accordingly, Dr. Moiduddin issued a letter stating that McCallum was:

1. NOT RELEASED BY EMPLOYEE PERSONAL NEUROLOGIST

2. NOT CLEARED FOR CDL BECAUSE OF WEAKNESS IN LEFT LEG AND UNPREDICTABILITY OF SYMPTOMS LIKE SUDDEN LOSS OF STRENGTH IN LEG, WORSE THAN THE BASELINE WEAKNESS

3. NOT CLEARED DUE TO SIDE EFFECTS OF MEDICATION, CAUSING INSOMNIA, DIZZINESS, ETC

4. TO GET SPE AT THIS TIME AS PER NEUROLOGIST RECOMMENDATIONS

(R 4) Based on this letter, MD Miller concluded that, per Dr. Moiduddin's evaluation, in coordination with McCallum's own neurologist's recommendations, he would not be returned to work before he was cleared to do so through an SPE.

Instead of submitting to the SPE process, however, McCallum, instead, took it upon himself to go to another doctor altogether to get a medical certification. McCallum chose Dr. Skomurski as he is an FMCSA certified doctor. Dr. Skomurski gave McCallum a medical card and a long form indicating that McCallum was approved to drive for six months. (GC 12). McCallum sent a text to Chad and Marlene Miller stating that Dr. Skomurski had cleared him; however, McCullum never delivered that certification to MD Miller (until shortly before the hearing in this matter, when the certification was long expired).

II. ARGUMENT

A. The ALJ Erred in Refusing to Admit Relevant Evidence

Counsel for the General Counsel and the Union each issued identical document subpoenas to MD Miller in advance of the hearing. (GC 17; Un 1). MD Miller produced documents in response to those subpoenas. The subpoenas sought documents related to

McCallum (e.g., his personnel file and medical records) in addition to other categories of documents related to MD Miller's practices with respect to its drivers' medical certifications. (*See id.*) Specifically, two categories of documents requested in the subpoenas sought:

> 3. Any and all documents showing communications from Respondent to Respondent's employees regarding medical documentation for the period January 1, 2010 to the present.
>
> * * *
>
> 10. Any and all lists showing information regarding employee medical cards for the time period January 1, 2010 to present.

(GC 17, Un. 1). MD Miller interpreted Request 3 as it is written: seeking ***communications*** ***from*** Respondent ***to*** its drivers regarding medical documentation for the requested period. Likewise, MD Miller interpreted Request 10 as it is written: seeking ***lists*** showing information regarding drivers' medical cards for the requested time period. However, in an "abundance of caution" the Company produced certain records to the General Counsel and the Union, even though they were not specifically requested, as it intended to rely on those documents at the hearing. Specifically, the Company produced McCallum's medical cards and long forms from 2010 to the present, and the medical cards and long forms of other drivers that were submitted in 2013. Some of those documents (McCallum's medical records) were also responsive to other requests. (*See* GC 17 & Un. 1, Request 1, respectively, seeking, *inter alia*, McCallum's "medical documentation").

At the hearing, after the Company learned that the General Counsel's case rested on its theory that the Company had "moved the goalposts" by requiring McCallum to submit a long form, it sought to introduce documents (in addition to those already produced, although not specifically requested) showing that it required its drivers, even before 2013 to have on file with the Company both a medical card and long form. To do so, the Company sought to introduce copies of those very forms for its drivers dating back to 2010. The General Counsel and the

Union objected saying that the records should be disallowed because they were not produced in response to the subpoena.

The ALJ cited *Perdue Farms*, 323 NLRB 345, 348 (1997), *affirmed in relevant part*, 144 F.3d 830, 833 - 834, (D.C. Cir. 1998), and *Packaging Techniques, Inc*., 317 NLRB 1252, 1253 (1995), in support of his ruling to disallow the introduction of any medical certifications cards or long forms for any employee, other than McCallum, prior to 2013. The ALJ found that because MD Miller did not produce those medical certification documents in response to subpoena requests that *did not even ask for them* that the Company was prohibited from using them at the hearing because it would have been prejudicial to the General Counsel's case and prolonged the hearing. (ALJ Dec. p. 6, ll. 1-9). Adding further error to his ruling to exclude the documents, the ALJ further barred any testimony that went to the issue of whether the Company had a practice of requiring all drivers to have medical cards and long forms on file prior to 2013.

The ALJ's ruling on the subpoena issues failed to take into consideration that the subpoenas did not even ask for the documents that he then ruled were barred from admission. The documents should have been admitted and considered—and clearly establish that the Company had a practice of requiring employees to have on file with the employer both the medical card and the long form of their medical certification both during and prior to 2013. (R. 5 (medical cards and long forms submitted by drivers in 2013), Rejected Exhibit 2 (drivers' medical cards and long forms pre-dating 2013), GC18 (McCallum's long form from 2010); GC 13 (text message from Marlene Miller to McCallum stating that their standard practice has always been that the doctor send the long form to the Company directly)). The erroneous exclusion of this evidence precluded the Company from addressing the General Counsel's argument at the hearing that the requirement for McCallum to submit a long form in 2013

somehow "moved the goalposts" with respect to what was required of him—an argument that the ALJ adopted.

This is nothing like the situation in *Perdue Farms* where the evidence was barred from being admitted which had specifically been requested but not produced. Here, the ALJ, in effect, barred the Company from admitting documents and evidence at the hearing because the Company was *over-inclusive* in its production in response to the Union and General Counsel subpoenas. The ALJ's ruling and sanction was unwarranted and deeply prejudiced the Company's ability to present its defense.

B. The ALJ Erred in Refusing to Consider Certain FMCSA Regulations

Despite the fact that much testimony was elicited by all parties (and by the ALJ himself) regarding the Department of Transportation ("DOT") regulations as administered by the FMCSA, the ALJ specifically refused to consider those regulations while rendering his decision. (ALJ Dec. p. 1, last sentence, "I will not consider as evidence what [MD Miller] asserts are [FMCSA] regulations, inasmuch as they were not made part of the record.")

Not only is the ALJ's ruling that he would not consider the FMCSA regulations improper because such regulations were front and center during the entirety of the two-day hearing, but even more so because of his justification for refusing to consider the federal regulations—because they were not "made part of the record." NLRB ALJs routinely and appropriately consider federal and state regulations, whether under the theory that they may be judicially, or "officially" noticed (*see, e.g.*, *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB 398, 403 fn. 14 (2004), *enf'd.*483 F.3d 683 (2007) (judge properly took judicial notice of requirements mandated by state statutes). or, even more basically, because their application is not a point of "fact" to be introduced on the record, but is simply "argument." *See, e.g.*, *First Transit, Inc.*, 352 NLRB 896, 901 (2008), finding:

> [t]he request that I take judicial notice ("official notice" in Board proceedings) of several U.S. Department of Transportation regulations governing commercial drivers is actually unnecessary. Pointing to them is simply argument, based on public regulations which any judge may take into account to the extent necessary for a just result. The duty to reach a just result covers looking at both Federal and State statutes and regulations.

Here, not only did the ALJ refuse to consider the applicable FMCSRs, he went so far as to cast doubt on the authenticity of the regulations themselves, stating only that they were "what [MD Miller] *asserts* are [FMCSA] regulations." (ALJ Dec. p. 1).

Here, there is no reason why the ALJ decided, *sua sponte*, that he would not consider any FMCSR cited by the Company in its post-hearing brief, especially after the FMCSRs' application to this case was heavily discussed and testified about at the hearing. The applicability of those regulations is not in dispute. Both parties addressed them and elicited testimony regarding various features of the medical certification provision of the FMCSRs. Even the copies of the medical cards and long forms submitted into evidence state the authority of the FMCSRs (*See, e.g.*, GC 6,(top of medical card) and GC 7 (last statement on page 3 of long form)).

By refusing to consider and apply federal regulations concerning the mandatory procedures for employers, drivers and medical examiners to follow when determining the medical qualification of a driver, the ALJ, in essence, refused to consider the central issue in this case—whether the Company was justified in requiring McCallum to have completed a valid medical certification resulting in the obtainment of a medical card and long form prior to allowing him to drive a Company truck on the highways. This error is made more prejudicial to Respondent when combined with the ALJ's improper refusal to entertain any evidence related to the Company's practices of obtaining both medical cards and long forms from drivers even prior to 2013—even evidence (to be discussed below) related to the consistency of those prior

practices as demonstrated by an examination of the General Counsel's *own* exhibit (see GC 13, text message from Marlene Miller to McCallum stating that the Company had always required the long form to be submitted directly by the doctor, which is specifically permitted by FMCSR § 391.43(g)(2)).

C. The ALJ Erred by Concluding That the Company Violated Sections 8(a)(1) and (3) of the Act by "Effectively" Terminating McCallum

The Board's longstanding test to determine whether an employer has discriminated against its employee in violation of Section 8(a)(3) is set forth in *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981). The test in *Wright Line* is premised on the legal principle that "an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation." *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). It first requires the General Counsel to make an initial showing of anti-union animus "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct." *Id.* The "ultimate burden remains, however, with the General Counsel." *Id., citing Wright Line,* 251 NLRB at 1088, n.11. Contrary to the ALJ's conclusion, the General Counsel failed to meet his burden.

1. The ALJ Erred by Concluding that the General Counsel Established a *Prima Facie* 8(a)(3) Case.

The General Counsel's initial burden requires establishing a *prima facie* case that anti-union animus was motivating factor by a preponderance of the evidence, consisting of four essential elements: (1) the existence of activity protected by the Act; (2) that the employer was aware that the employee had engaged in such activity; (3) that the alleged discriminatee suffered an adverse employment action; and (4) a "motivational link, or nexus, between the employee's

protected activity and the adverse employment action." *Id.* The fourth element is also frequently stated as the requirement to demonstrate that the action was substantially motivated by animus. *See Valmont Indus., Inc. v. NRLB*, 244 F.3d 454, 463 (5th Cir. 2010) (holding that a showing of anti-union animus is a mandatory element of an 8(a)(3) violation). "Unwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participation in union activities." *Id*. at 464 (internal citations omitted).

The Board has cautioned, however, that under this standard, "mere suspicion cannot substitute for proof with respect to an essential element of the General Counsel's *Wright Line* burden of proof. *Reliable Disposal, Inc.*, 348 NLRB 1205, 1206 (2006), *citing Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999). Importantly, the fourth element requiring an evidentiary link of animus to the adverse action is essential to the General Counsel's burden. *See, e.g., American Gardens*, 338 NLRB at 645 (remanding case to ALJ where there was no "genuine controversy" over first three elements, and dispute revolved around fourth element of causal nexus, where ALJ did not address all of the relevant record evidence); *In re Tracker Marine*, 337 NLRB 644, 647 (2002) (dismissal of complaint where General Counsel failed to establish link between protected activity and adverse action, where there was no evidence to indicate that employer took employee's union activity into account when deciding to discipline him, and where evidence demonstrated that adverse action was for legitimate reason); *Jackson Hosp. Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011) (enforcement denied where Board's theory was "mere speculation" without evidentiary support, and "no evidentiary link" to "causally connect the two facts" of protected activity and adverse action).

The ALJ, applying the *Wright Line* burden-shifting analysis, concluded that the General Counsel had made a *prima facie* case showing that McCallum's Union activity "was a motivating factor" in the Company's decision to require him to provide a long form, and thereafter go to Dr. Moiduddin for a second opinion. In doing so, however, the ALJ concluded that the General Counsel had established both that the requirement that McCallum be validly certified was an "adverse action" and that there was the requisite evidentiary link between McCallum's Union activity and his being required to supply a valid long form before being allowed to reinstated to drive a truck.

First, the requirement that McCallum have a valid medical certification on file with the employer before being allowed to drive a commercial motor vehicle is not an adverse action but, instead, is simply compliance with the FMCSRs.

Under the FMCSRs, each employer has the affirmative duty to not allow anyone who is not physically qualified to drive. "A motor carrier's duty to ensure that a driver is physically qualified is a continuing one." *Yellow Freight System, Inc. v. Amestoy*, 736 F. Supp. 44 (D. C. Ver. 1990). That duty also applies to the Employee/Driver (here, McCallum). "Both employer and employee have an affirmative duty to ensure that only qualified drivers operate commercial motor vehicles: 'A person shall not drive a motor vehicle unless he is qualified to drive a motor vehicle. ... [A] motor carrier shall not require or permit a person to drive a motor vehicle unless that person is qualified to drive a motor vehicle." *Id*. at 47-48, citing 49 C.F.R. § 391.11(a). *See, also, Thomas v. ABF Freight System, Inc.*, 31 F. Supp. 2d 1119 (E.D. WI 1998), ruling that insulin dependent truck driver was not qualified under the Federal Motor Carrier Safety Regulations. The truck driver in *Thomas* had a prior DOT medical certificate covering the period in question, but was required to have a second medical opinion. The existence of the DOT

certificate covering a certain period of time did not negate the FMSCRs ongoing requirements. *Id*. at 1122.

Here, the overwhelming record evidence showed that McCallum's condition had deteriorated, and was continuing to do so: his medical evaluation in 2010 was good for 24 months; his March 2013 evaluation was only good for 6 months, and his November 2013 evaluation was only good for three months; he had been prescribed, as of April 2, 2013, the use of the WalkAide to electrically stimulate his foot so he could walk; Dr. Moiduddin found that the weakness in his left leg and unpredictability of his symptoms were worse than the baseline weakness and recommended an SPE; his own neurologist treating him for MS could not state that McCallum could safely drive a truck; McCallum admits to not being able to climb onto flatbeds to properly perform all the functions of his job safely; both Chad and Marlene Miller testified to continuing deterioration of his condition that they observed in just the one week of work he performed in April 2013. Certainly, on these facts alone, even if McCallum had a valid long form on file (which he did not) the FMCSRs establish that the employer could not allow him to drive without getting a further evaluation. All of this is only counter-balanced by McCallum's self-serving testimony that his condition had not changed since 2010.

The ALJ found that requiring McCallum to obtain a valid long form and to undergo an examination by an FMCSA-certified doctor were departures from the Company's practices, (which, presumably, the ALJ found amounted to an adverse action), and the ALJ inferred animus and pretext therefrom. (ALJ Dec. p. 6, ll 11-15; p. 14, ll. 33-34; p. 12, ll. 35-39; p. 15, ll. 1-8). However, there is no record evidence at all establishing that the Company ever faced this situation with another driver. The Company did not reject McCallum's long form because it was completed by a non-FMCSA-certified doctor. Rather, it found deficiencies in the long form

(obvious omissions by McCallum regarding his condition and treatment) that it felt could have downplayed his MS condition with the evaluating doctor (not because he was not FMCSA certified, but because McCallum failed to fill out the form with the legally required and relevant information). The Company did not "arbitrarily" require McCallum to get evaluated by an FMCSA-certified doctor, but it did so only after it consulted with the FMCSA on how it should deal with the situation. Certainly such consultation is not the mark of arbitrariness, but thoughtful consideration of the issue. It is undisputed that the Company was never faced with any other driver who had the same issues as McCallum in April 2013: an obviously deteriorating physical condition (to the point he needed to wear a device to stimulate his foot to walk) and a medical certification that was predicated on incomplete information about the driver's medical history, medications and limitations.

The ALJ's implication that McCallum's being required to obtain valid medical certification in the circumstances before he would be allowed to drive a Company truck amounted to an "adverse action" is not supported by the record evidence. Being required to comply with the FMSCRs simply cannot be found to be an adverse action.

Even if the requirement that McCallum receive a second opinion from an FMCSA-certified doctor somehow could be considered an "adverse action," the ALJ's finding that such action was motivated by anti-union animus also was clearly erroneous. The ALJ found "reflections of inferred animus" from the fact, stated above, that the Company did not have a policy of requiring all drivers to be evaluated only by FMCSA-certified doctors. (ALJ Dec. p. 15, ll. 7-8). However, again, the Company did not require even McCallum to be evaluated by an FMCSA-certified doctor until it was faced with a situation it had never faced before: McCallum's obvious deteriorating condition; the revelation of his being required to use the

WalkAide; his increasing difficulty in even getting into and out of his truck; and the submission of a long form that obviously down-played his MS to the examining doctor (it did not list any limitations, muscular problem, medications). The ALJ would render any employer regulated by the FMSCA from ever obtaining a second opinion by a doctor of its choosing when faced with the observation of physical limitations and an incomplete medical certification form, if it does not also obtain second opinions from FMCSA-certified doctors for all drivers, regardless if there is any issue with their existing certification or their observed physical limitations. Such a finding is clearly erroneous.

The ALJ also found the timing of the decision to require a long form and second opinion from McCallum amounted to a showing of animus. Specifically, the ALJ found that the requirement, coming immediately on the heels of the Company's losing the grievance and being ordered to reinstate McCallum, that McCallum would be required to submit a long form showed the "single most significant factor inferring animus." (ALJ Dec. p. 14, ll. 17-21). However, that finding is entirely speculation and specifically ignores the other relevant evidence. First, why would it be surprising that Miller would look to see if McCallum had a valid medical evaluation after he was reinstated, considering that just the very last time that she saw him on the jobsite (the only time she had seen him that year, a few days prior to his termination), Miller felt the need to go to him to check on his condition because he looked so poor? Moreover, it was at the grievance hearing that Marlene Miller first learned that McCallum was using the WalkAide for assistance in stimulating his foot to walk. Miller would have had ample reason to verify that his medical certification was in order based on those facts alone. There would be no reason for her to look up his medical forms prior to his being ordered reinstated—if he was not reinstated, it would be moot. The fact she learned at the grievance hearing that his condition was apparently

worse than she even observed in early April, again renders perfectly legitimate her decision to verify his medical certification that day, and only conjecture and speculation could establish such as anti-union animus.

Board precedent supports the Company's position. In *Frierson Building Supply Co*., 328 NLRB 1023, 1024 (1999), the Board, in reversing the ALJ's finding that Respondent unlawfully discharged an employee for his union activity, reiterated:

> It is axiomatic that the burden of proof rests on the General Counsel to establish that antiunion animus was a motivating factor in the discharge decision. The record in this case shows nothing more than that the timing of [the employee's] discharge shortly after the representation election was a coincidence. Such a coincidence, at best, raises a suspicion. However, 'mere suspicion cannot substitute for proof' of unlawful motivation.

In that case, an employee who had served as the union's observer in a union election in late December was terminated by a newly appointed personnel manager based on a complaint by another department manager about poor work habits shortly after the election. *Id*. The new personnel manager reviewed the employee's personnel file, which contained numerous complaints. The personnel manager then spoke with the employee's supervisors, other supervisors, and coworkers about the employee's performance, and based on confirmation from the supervisors that the employee had poor work habits, terminated the employee. The Board found no direct evidence of antiunion animus, and rejected the ALJ's finding that the personnel manager's investigation was inadequate, leading to the ALJ's finding of animus. The Board also rejected the ALJ's reliance on documents missing from the employee's file as further evidence that belied the personnel manager's conclusion that the employee was unsatisfactory, and the employer's past tolerance of his poor work habits in the time leading up to the representation election. *Id.* at 1024. The Board concluded that the record showed nothing more than that the timing of the discharge shortly after the election at best raised a "suspicion," but such suspicion,

according to the Board, could not substitute for proof of unlawful motivation. *Id*. Likewise, here the ALJ's "single most significant factor inferring animus" was the timing of the decision to verify McCallum's medical forms. As stated above, when all facts are considered, the timing is not suspicious at all. Moreover, Board precedent will not allow such timing to substitute for actual evidence of unlawful motivation, which, in this case, there is none. For the most part, the ALJ found that the mere fact that McCallum engaged in protected activity (protesting potential wage and benefits cuts, and the filing and winning of a grievance over his termination) must mean that any decisions the Company made with respect to him in close proximity thereafter were made out of animus.

Remarkably, the ALJ also pointed to the long-standing and harmonious nature of the relationship between the Company and the Union as evidence that the Company's actions with respect to McCallum were motivated by anti-union animus. Specifically, the ALJ found that because the parties' relationship had been so peaceful for so long, without any hint of acrimony, that as soon as one set of grievances was filed by McCallum, that the Company's attitude toward the Union in general went from one of 23 years of peaceful co-existence to an all-out frontal attack against any employee that associated with the Union. This analysis flies in the face of Board precedent universally finding that the long-standing peaceful collective bargaining relationship between a company and a union militates against the finding of animus.

2. The ALJ Erred by Declaring the Company's Reason for Requiring McCallum to Obtain a Valid Long Form and a Second Opinion Was Pretext for Discriminating Against Him.

Moreover, even if it could be concluded that McCallum's union activity was a motivating factor in the decision to require him to obtain a valid long form through a second opinion, the ALJ found that the Company failed to demonstrate that it would have engaged in the conduct even absent such.

Even assuming, *arguendo*, that the General Counsel had presented sufficient evidence to establish his *prima facie* case under *Wright Line*, there is no evidence that Marlene Miller would not have required McCallum to obtain a second opinion by an FMCSA-certified doctor in the absence of his Union activity. The ALJ concluded, however, that the Company's reasons for requiring the medical certification and examination were "laughable" and their "flimsiness…has to be viewed as evidence of pretext. (ALJ Dec. p. 14, ll. 44, 47).

Miller testified that she based her decision to require a second opinion by an FMCSA-certified doctor because of McCallum's apparent worsening appearance and condition, his inability to perform certain job functions, and the fact that his existing long form certification was predicated on his false and incomplete filling out of the employee-portion of the long form. The ALJ however, misconstrues these statements, however. Specifically, he reasoned that McCallum's "appearance" and "inability to do the job" could not have factored into Miller's decision because neither she nor Chad Miller had ever talked to Miller about either and they brought him back to work in April 2013. (ALJ Dec. p. 14, ll. 37-40). This finding, however, is inconsistent with the record facts. First, it is undisputed that Chad Miller spoke with McCallum about his inability to do certain job functions, such as pulling flatbeds instead of dump trailers. Moreover, Marlene specifically testified that on the first and only occasion she observed McCallum upon his return to work in April 2013 (days before he was fired) she felt compelled to go up to him in the yard because he looked so poor that she wanted to see if he was alright. She spoke to him about his condition and they further spoke about potential new medications. While McCallum failed to state his condition was worsening (and also failed to inform Miller that he was then using the WalkAide devise for walking), such does not negate the fact that Miller observed McCallum looking bad and discussed with him his condition and treatment.

Moreover, the ALJ found that the fact that McCallum had been recalled from winter layoff in April 2013 shows that the Company did not really rely on his appearance and ability to do certain jobs when it decided to ask for a complete long form. However, at the time it recalled McCallum, he had been off on layoff for several months and there would be no way for the Millers to have ascertained over the course of the winter without observing him, that McCallum's condition was worsening. In the first week he was called back in 2013, Chad observed McCallum having much difficulty on the job and, as mentioned, Marlene Miller observed how poor he looked simply standing next to his truck in the yard.

As stated above, the FMCSRs required that the employer not allow anyone to drive a truck, regardless of a current medical certification, if it appeared that the employee was not medically fit to do so. The culmination of McCallum's appearance, his inability to do certain jobs, and the learning that he had just been fitted with the WalkAide caused Marlene to look and see if his certification was current. Upon reviewing the long form McCallum supplied, the Company could not be sure he had been forthcoming with the medical examiner about the extent of his MS. Contrary to the ALJ's statement, the Company did not find that McCallum had fraudulently concealed from the Company his MS (*see* ALJ Dec. p. 14, ll. 43-44), but rather that he may have downplayed the extent of his MS-related limitations (rather than the fact he had MS) to the examining doctor. In light of the circumstances, it is against the weight of the record evidence that the ALJ found that the employer had no legitimate concern that McCallum was not medically qualified to perform as a driver under the applicable regulations. That legitimate concern was validated when Dr. Moiduddin could not certify McCallum, even with consultation with McCallum's treating neurologist.

The ALJ also found pretext in the fact that the Company did not require other drivers to be certified by FMCSA-certified doctors, but that issue has already been discussed. There was no arbitrary or disparate treatment of McCallum because no other employee had ever been in these circumstances.

Finally, the ALJ found evidence of pretext (or "subterfuge") in the Company's failure to reinstated McCallum in May 2013 after he texted the Company that he had received a certification from Dr. Skomurski, an FMCSA-certified doctor. However, it is undisputed that McCallum never presented or sent in that certification to the Company (until in conjunction with the hearing in this case, after it was expired). Next, McCallum failed to follow the recommendation and direction of his treating neurologist and Dr. Moiduddin that he undergo an SPE pursuant to the FMCSRs. Instead he shopped for another doctor. Even then, the FMCSRs do not require the Company to accept the certification of Dr. Skomurski. Rather, when there are conflicting results of doctor evaluations, the FMCSRs have a procedure that allows the issue to be submitted to the FMCSA for determination. McCallum's obtainment of the new certification, at best, allowed him to request that the dispute procedure be initiated—it did not require the employer, in the face of all the evidence (including Dr. Moiduddin's evaluation, which considered the treating neurologist's opinion) that McCallum could not be cleared until an SPE was performed. Had McCallum availed himself of these procedures, and had he obtained an SPE (as recommended and directed by his doctor), he would have been eligible to take on the duties of a driver. Because he chose specifically not to follow the applicable FMCSR procedures available to him, he was not reinstated.

In *Consolidated Biscuit Co.*, 346 NLRB 1175 (2006), *enf'd.* 301 Fed Appx. 411 (6th Cir. 2008), the Board rejected the ALJ's disparate treatment finding under *Wright Line*, and

explained, "Although the Respondent may not have acted with perfect consistency through the years, the General Counsel has not shown a disparity along Sec. 7 lines. …[W]e find this evidence too equivocal to support the General Counsel's assertion of disparate treatment and his corresponding argument that the Respondent's reasons for terminating [the union supporting employees] are pretextual. *Id.* at fn. 24; *see also Hearthside Food Solutions, LLC,* 2012 NLRB LEXIS 102, Cases 9-CA-46342, 9-RC-18351 (ALJ Paul Buxbaum, March 1, 2012) ("In conducting my analysis of this issue, I have been mindful of the Board's sensible admonition that 'perfect consistency' is not required in order to rebut a claim of pretext); *see New Otani Hotel & Garden,* 325 NLRB 928 (1998) ("absent independent proof of the employer's animus, even evidence of actual, conscious disparity of treatment by an employer or its agents when it comes to [policy]-enforcement is generally not a reasonable basis for inferring that the employer's enforcement of the [policy] in a given instance against an employee who has engaged in union activities known to the employer was motivated in any way by the employee's union activities").

The ALJ's inference of pretext from Miller's alleged stray from policy of not requiring FMCSA-certified doctor evaluations or second opinions is rebuked by Board precedent. In *DPI New England,* 354 NLRB 849 (2009), *abrogated by New Process Steel L.P. v. Nat'l. Labor Relations Bd.,* 130 S. Ct. 2635 (2010), the Board reversed the ALJ's finding that the Company had violated Section 8(a)(3) and (1) of the Act by imposing a new "Class A" licensing requirement and discharging three Union supporters pursuant to that new requirement. For purposes of its analysis, the Board assumed that the General Counsel had met his initial burden under *Wright Line* to prove that union activity was a motivating factor in the decision to impose the licensing requirement and to discharge the employees, and examined whether the employer had met its burden to prove that it would have acted in the same manner regardless of union

activity. *Id*. The Board found, contrary to the ALJ, that the employer would have imposed the requirement and discharged the employees even in the absence of union activity. The Board found unwarranted the ALJ's inference that the employer established an "extremely short deadline" for upgrading to a Class A license so that "the drivers would almost certainly fail to meet it." In so finding, the Board relied on the wording of the written notice, which offered drivers assistance – in the form of training, the use of its trucks, and help from its experienced Class A drivers, both for practice and for employees' road tests – in obtaining their Class A licenses. The Board found that these "offers of assistance belie the judge's inference that Respondent was hoping that the Class B drivers would be unable to meet the deadline." *Id*.

While the *DPI New England* case certainly presents distinguishing facts, it is undisputed that here, the Company could not have set up the system to fail for McCallum. Rather, all McCallum needed to do was follow the requirements of either Dr. Moiduddin (in conjunction with his own neurologist's recommendation to obtain an SPE) or apply for the contrasting medical evaluations to be evaluated by the FMCSA. The Company did not set up those those regulations, and it did not control Dr. Moiduddin or McCallum's neurologist. The system was not set up for McCallum to fail. It is the same system every driver regulated under the FMCSA is subject to. Moreover, the Company gave him no deadline for completing an SPE—McCallum simply chose not to get one. For the reasons set forth above, the ALJ's conclusion that the Company violated Sections 8(a)(1) and (3) of the Act by "effectively terminating" McCallum on and after April 22, 2013 should be reversed in its entirety as unsubstantiated by the record evidence.

D. The ALJ Erred in Finding that the Company Violated 8(a)(1) by Telling McCallum that His Grievance Would Get Nowhere

The ALJ also found merit in the General Counsel's contention that once McCallum stated to her that he would grieve his discharge she stated that would be futile. (ALJ Dec. p. 16, ll. 9-11). However, Miller never said that such filing would be futile. Rather, McCallum testified that he told Marlene at the April 11, 2013 meeting, after he had been discharged for insubordination, that he would "go to the Union and file a grievance and one would be for harassment." (Tr. 36). In response, McCallum testified, Marlene stated, "Go file a grievance. You'll get nowhere." (Tr. .36). It is uncontested that McCallum immediately went to the Union hall and filed three grievances, two of which he won. None of the grievances was over "harassment."

It cannot seriously be found that a statement by Miller that the filing of a specific grievance or set of grievances would "get nowhere" amounts to a statement that "would reasonably tend to coerce employees in the exercise of their Section 7 rights." *See Flagstaff Med. Ctr. v. NLRB*, fn. 1 (D.C. Cir. 2013) (finding statements that do not tend to interfere with exercise of Section 7 rights cannot amount to statements of futility). Here, the General Counsel entered not one bit of evidence that Miller's statement had any effect on any employee in the exercise of their Section 7 rights. Rather, the uncontested evidence shows that the exact opposite is true: McCallum immediately upon his discharge went to the Union hall and discussed the filing of several grievances with Elsbree. Those grievances, in fact, were filed.

Moreover, in the context that were made, the reasonable understanding of the statements is that Marlene felt that the grievances threatened to be brought (the only specific one was for "harassment") would lack merit. It takes a great leap of logic (one which the ALJ does not even so much as explain), to find the statement that an individual grievance would go nowhere,

actually tended to have the effect on employees that supporting the union or engaging in union activity was futile. . To quote the D.C. Circuit Court in *Flagstaff Medical* in a case alleging statements of futility, "[t]he record does not support this interpretive leap. *See Pac. Micr. Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000) ("To meet the requirement of '[s]ubstantial evidence,' the Board must produce 'more than a mere scintilla' of evidence; it must present on the record 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' taking into consideration the 'record in its entirety . . .including the body of evidence opposed to the Board's view.'" (internal citations omitted)). Here, the General Counsel failed to offer even a mere scintilla of evidence that the statements had any effect whatsoever on any employee, despite that fact that both McCallum and Crownhart testified at the hearing. The record does not support an 8(a)(1) violation that Miller's statement would tend to cause any effect on any employee's Section 7 rights.

III. CONCLUSION

For the reasons cited above, Respondent M.D. Miller Trucking & Topsoil, Inc. respectfully requests that the Board review and reverse Administrative Law Judge Sandron's proposed Decision and Order.

Dated: May 21, 2014.

M.D. MILLER TRUCKING & TOPSOIL, INC.

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CERTIFICATE OF SERVICE

Michael F. Hughes, an attorney for the Employer, hereby certifies that a true and correct copy of the foregoing Respondent M.D. Miller Trucking & Topsoil, Inc.'s Brief in Support of Its Exceptions to the Administrative Law Judge's Decision was served electronically upon the following on this 21st day of May, 2014:

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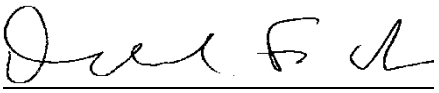
By: 

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